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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO.

FRANKLIN EUGENE NIXON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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May 28, 1981

IN THE
SUPREME COURT OF THE UNITED STATES
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FRANKLIN EUGENE NIXON, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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The petitioner Franklin Eugene Nixon respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 16, 1981.

## QUESTIONS PRESENTED

1. Whether the government's deliberate refusal to disclose an agreement of no prosecution in exchange for trial testimony of its chief witness which refusal to disclose continued throughout and after the trial violated the due process rights of the petitioner.

2. Whether the petitioner's testimony before a grand jury at a time when there were no other suspects and for the sole purpose of obtaining perjury counts was material or competent when a prosecution for the matter under inquiry would have been barred by Sixth Amendment speedy trial considerations.

3. Whether the petitioner's right to a speedy trial was circumvented by the particular strategy embarked upon by the government in dismissing the counterfeit charge and indicting on petitioner's assertion of innocence under oath.

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## OPINION BELOW

The Opinion of the Court of Appeals is reported as *United States v. Nixon*, 634 F.2d 306 (5th Cir. 1981).

## JURISDICTION

The judgement of the United States Court of Appeals for the Fifth Circuit was entered on January 16, 1981, affirming petitioner's conviction of August 31, 1979. The Court of Appeals denied a timely petition for rehearing and petition for rehearing en banc on April 29, 1981, and this petition for certiorari is filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. AMEND. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## STATEMENT OF THE CASE

In June of 1975 the government filed charges against the petitioner for counterfeiting and he was arrested two days later. After a speedy trial motion was filed on petitioner's behalf, the government dismissed the charges in late 1975. Next, Petitioner was subpoenaed before a federal grand jury in December, 1977 and was asked, in essence, if he were guilty of the 1975 counterfeiting. He denied guilt and asserted his innocence. The Assistant United States Attorney assigned to the matter at that time testified that there were no suspects other than petitioner, that he knew the petitioner maintained his innocence but that because of petitioner's religious beliefs thought he would confess before the grand jury. On April 18, 1979, petitioner was indicted by a grand jury for his answers to the questions asked by the government before the 1977 grand jury.

Most of the evidence against petitioner came from a former employee who confessed to the counterfeiting but maintained that the petitioner was involved. Charges of counterfeiting were made against that employee in 1975 and were dismissed in September, 1977, approximately two months prior to this petitioner's subpoenaed appearance before the grand jury. The Assistant United States Attorney testified that at the time he dismissed the counterfeiting charges against the employee, September 1977, he considered too much time had passed for the government to withstand a Sixth Amendment speedy trial attack. Prior to petitioner's trial in July, 1979, that employee had never been indicted, entered a plea, nor been subpoenaed before a grand jury.

The petitioner far in advance of trial filed appropriate motions requesting, among other things, disclosure of any benefits or promises of benefits made to the employee in return for his assisting the government in its prosecution of the petitioner. No disclosure was forthcoming. Instead, the government took the position at trial that no immunity had been granted to the employee and no agreement made. During cross-examination of the employee at trial the defense was able, by happenstance, to discover from the employee the framework of what would appear to have been an agreement not to prosecute between himself and the government in return for his testimony at trial against petitioner. However, this was unclear, especially with the government continuing at trial to tell the jury there was no immunity and no agreement.

The Fifth Circuit remanded while this case was before it for an evidentiary hearing to determine whether or not there had been an agreement between the employee and the government. As a result of that remand the Court of Appeals concluded there was a meeting three or four weeks prior to trial and, "our analysis of what happened at the June 7 meeting compels us, nevertheless, to conclude that the parties then came to an agreement." However, the court concluded that since the cross-examination of the employee had elicited some points of the agreement the defense was not prejudiced. The court in making that determination did not consider the re-direct examination of the employee by the government which contained:

Q. You've never been granted any immunity, have you?

A. No., sir.

Moreover, the Court of Appeals apparently did not consider that the government took the position throughout the remainder of the trial and in argument to the jury that there had been no grant of immunity or agreement made with this most important prosecution witness.

Thereafter the jury convicted this petitioner of perjury.

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE EFFECT OF A DELIBERATE REFUSAL TO DISCLOSE THE AGREEMENT BETWEEN THE PROSECUTION AND ITS CHIEF WITNESS AND INVOLVES SUCH CONDUCT BY THE GOVERNMENT AS TO CALL FOR THIS COURT'S SUPERVISION.

The Fifth Circuit in this appeal clearly had before it the deliberate non-disclosure prior to trial and during trial, after a specific request pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) for any agreement between the prosecution not to prosecute in return for the testimony of the witness, Gunnin, a former employee of petitioner. *Giglio v. United States*, 405 U.S. 150 (1972), compels disclosure of such information as exculpatory and the Fifth Circuit in fact found that had some of the information not come out at trial on cross-examination of the employee, the petitioner would have been entitled to a new trial.

In spite of this deliberate non-disclosure by the government, the court speculated at prejudice to the petitioner at the time of trial. While stating that the behavior of the prosecutor was "not to be commended," the court failed to view the question in terms of the obvious misconduct and failed to apply standards enunciated in other circuits which when considering these tactics require a lesser showing of prejudice.

> "If non-disclosure of *Brady* material is occasioned by prosecutorial misconduct, prophylactic considerations assume overriding importance. Accordingly, as decisions in other circuits have recognized, a much re-

> duced showing of materiality is required for a defendant so victimized to obtain a new trial."

*Woodcock v. Amaral,* 511 F.2d 985, 989 (1st Cir. 1974).

The present case is one of non-disclosure and although the Fifth Circuit speaks in terms of disclosure, there was in fact no disclosure. To the contrary, the prosecution was still insisting on redirect and in argument, a fact overlooked by the opinion, that there was no agreement. The result, rather than allowing for full presentation of the facts and circumstances of such an agreement and making it clear to the jury, was a confusing presentation contradicted on redirect by the prosecutor representing the United States and clothed with all the authority of his office.

The Second Circuit has also held that deliberate non-disclosure such as that found in this case requires the grant of a new trial.

> "A new trial is required where the prosecutor's failure to disclose was a considered decision for the sake of obstruction, or where the value of the evidence to the accused could not have escaped him. Where the non-disclosure is passive, i.e., not deliberate in the above senses, the courts have sometimes modified the criteria for a new trial, and instead looked to the defendant's harm, i.e., prejudice."

*United States v. Polisi,* 415 F.2d 573, 577 (2nd Cir. 1969).

The Second Circuit has adopted a sliding scale as to the requirements for a showing of prejudice, depending upon the good or bad faith of the prosecutor. Where such conduct amounts to deliberate suppression, prophylactic considerations of detering the conduct of the prosecution assume paramount importance. *United States v. Pfingst,* 490 F.2d 262 (2nd Cir. 1973), *cert. denied,* 417 U.S. 919.

In its opinion in this case the Fifth Circuit not only ignored the obvious misconduct of the government but failed to consider the crucial question, which, as the Second Circuit cases have recognized, is not use at trial, but prejudice caused to the defendant by not having the information sufficiently in advance of trial to allow its development. Even in cases where non-disclosure is negligent rather than deliberate, a new trial is mandated if the added item, developed as it would have been by counsel, could have produced a reasonable doubt in the minds of the jury. The scope of inquiry on this question is not limited to use of the information at the trial itself, but also allows examination of how the information could have been used in preparation for trial. *Grant v. Alldredge,* 498 F.2d 376 (2nd Cir 1974).

In the case *sub judice* where the testimony of the former employee, Gunnin, was "indispensably necessary" to the government's case, it should not be sufficient if the defendant stumbles on some of the information in cross-examination. It is unquestionable that a pre-trial disclosure of the agreement of the witness and the prosecution would have allowed counsel the opportunity to make further *Brady* requests to obtain details of the agreement and to present evidence to the jury in an organized, logical and coherent fashion. In measuring imponderables such as the effect of the manner of presentation of evidence on the minds of the jury, all doubts should be resolved in favor of the constitutional right of the defendant to due process.

This decision by the Fifth Circuit is a clear message to prosecutors not to follow *Brady.* With simple instructions to the witness to not volunteer the fact of the agreement unless asked, and then only as little as possible, the prosecutor is in a no-lose posture. If the agreement is not uncovered during trial, it most likely will not be afterwards, and no new trial results. If the defense is able

to expose some of the agreement, the prosecutor escapes with a mild rebuke.

The deliberate witholding of the exculpatory information from the defense coupled with the presentation to the jury of the position that no immunity nor agreement had been made between the government and its chief witness is such a departure from the accepted and usual course of judical proceedings as to call for the exercise of this Court's power of supervision.

## 2. THE DECISION BELOW CONFLICTS WITH A DECISION OF ANOTHER CIRCUIT COURT OF APPEALS AS TO THE MATERIALITY AND COMPETENCY OF A GRAND JURY WITNESS' TESTIMONY IN THIS CIRCUMSTANCE.

From the Statement of the Case we recall that petitioner was arrested on charges for counterfeiting in June, 1975 and at nearly the same time charges were made against the employee. As a result of a speedy trial motion on behalf of the petitioner the charges were dismissed. The prosecutor testified that by September, 1977, he considered that too much time had passed for any indictment to withstand a Sixth Amendment speedy trial attack so the counterfeiting charges were dismissed against the employee at that time.

Petitioner testified before the grand jury in December, 1977, and was asked only in various forms as to whether he had been involved in the 1975 counterfeiting. He testified he had not been. At the time of his testimony he was the only suspect and was known by the prosecutor to have continuously asserted his innocence. In such circumstances it becomes manifest that the petitioner was called before the grand jury for the sole purpose of obtaining perjury counts.

The circumstances in the present case are remarkably

similar to those found in *Brown v. United States*, 245 F.2d 549, 555 (8th Cir. 1957). There the Eight Circuit found a situation where the surrounding facts showed the only purpose for calling the suspect before the grand jury was:

> "[T] o get him indicted for perjury and nothing else is manifest beyond all reasonable doubt."

That court also held at 554, as to the purpose for the suspect testifying:

> "For the purpose of extracting testimony from him, with a view to prosecuting him for perjury and without any purpose of obtaining from him any evidence upon which, in whole or in part, it could find a true bill against anyone for any offense committed in whole or in part in Nebraska, and that such a purpose does not come within the competency of the grand jury;"

In the present case the majority simply swept this point lightly by noting that the Statute of Limitations had not run on the 1975 counterfeiting. This ignores the long established principle that for the test of materiality to be met, the false testimony must be capable of influencing the tribunal on the issue before it.

The prosecutor when questioned about why the only suspect was required to testify before the grand jury two and a half years later could only say that because of petitioner's religious beliefs he thought he might confess. It is respectfully submitted that it is beyond doubt that the only reason petitioner was required to testify, the prosecutor knowing petitioner maintained his innocence, was to have petitioner indicted for perjury. This was thought necessary by the government due to the passage of time since the counterfeit charges.

As was noted by Chief Judge Coleman dissenting in part in this case:

> "I feel that in evaluating the constitutional rights of the citizen against the government in a criminal case the picture must be reviewed as a whole, else constitutional rights could be nibbled away, one fragment at a time." Appendix A-17, infra.

The petitioner's rights in this case were certainly nibbled away.

The conflicts between this opinion and *Brown v. United States, supra.*, justify the grant of certiorari to review the judgement below.

3. THE DECISION BELOW WAS IN ERROR IN DETERMINING WHEN THE PROPER TIME PERIOD BEGINS TO RUN IN CONSIDERING A VIOLATION OF SIXTH AMENDMENT SPEEDY TRIAL RIGHTS.

The petitioner here urged the Fifth Circuit to follow wording contained in *United States v. DeTienne*, 468 F.2d 151 (7th Cir. 1972), to the effect that in computing the time period for considering Sixth Amendment speedy trial delay it is to be considered whether the crime for which a defendant is ultimately prosecuted really only gilds the charge underlying the initial arrest. Also, the Fifth Circuit in a previous case, *United States v. Avalos*, 541 F.2d 1100 (5th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977), had held that when determining the commencement of that time period it is the activities forming the basis of the arrest which are to be considered, stating;

> "Because the activities forming the basis of the conviction under review are those for which the appellants were originally arrested, we hold that the right to a speedy trial attached on the date of the initial arrests."

*Avalos, supra.*, at 1109. Thus, if the activities forming the basis of the perjury prosecution in 1979 of this petitioner are basically the same as the activities forming the

basis for the 1975 charge and arrest for counterfeiting, the post-accusation period of delay must be commenced in June, 1975. That is, we should look to the substance and not the form.

This Court has held in *United States v. Marion*, 404 U.S. 307 (1971), that the rationale for beginning the speedy trial period on the date of arrest is because the arrest is a public act that may seriously interfere with a person's freedom, may disrupt employment, drain financial resources, curtail associations, subject one to public obloquy, and create anxiety in the defendant and his family. All of those considerations were shown to exist in this case commencing at the time of the 1975 arrest and not from the 1977 grand jury testimony or April, 1979, indictment.

The Fifth Circuit here failed to look at the substance of the right to a speedy trial and instead looked merely at the label given to the charge by the prosecutors. It may be noted that in *United States v. Cabral*, 475 F.2d 715 (1st Cir. 1973), where the arresting state officer told the defendant the arrest was for possession of a sawed-off shotgun, "as openers", the time period for the speedy trial requirement was measured from the original arrest even when the State prosecution was for totally different charges.

As these decisions indicate, what should be examined is the *factual* basis of the accusation at the time of arrest and the factual basis needed to prove the crime being prosecuted. Here the trial of petitioner in July, 1979, was in almost every way a trial for the counterfeiting he was arrested for in June, 1975. Any observer of the trial would without question have thought he was witnessing a counterfeiting trial.

As Chief Judge Coleman notes in his dissent, Appendix A-17, infra., it was undisputed by the government that

in December, 1975, subsequent to petitioner's speedy trial motion and the government's dismissal, it could not obtain a conviction against petitioner on the evidence it had. Two years later it had no evidence beyond what it had available at the date of dismissal when the prosecutor conceived the idea of calling petitioner before the grand jury.

> "To prove the perjury the government, having defeated Nixon [petitioner] of his speedy trial for that offense, had to prove that offense as the indispensable basis for its perjury conviction. To that extent at least, Nixon's right to a speedy trial has been successfully circumvented. The government strategy worked." Chief Judge Coleman's dissent, Appendix A-18, infra.

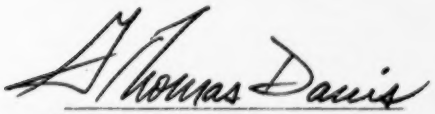
What this decision allows is the prosecutor to use a subterfuge to prosecute for an offense for which prosecution would otherwise be barred. It allows the prosecutor to bring a defendant before a grand jury knowing he cannot be prosecuted for the matter upon which he is called to testify and to use the grand jury as a tool to revive former charges and circumvent the constitutional right to a speedy trial.

The circumvention of petitioner's right to a speedy trial was so outrageous in this case as to warrant this court's intervention and justifies the grant of certiorari the review the judgement below.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgement and opinion of the Fifth Circuit.

Respectfully submitted,



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May 28, 1981

CERTIFICATE OF SERVICE

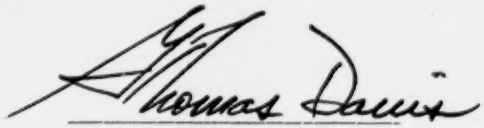
I hereby certify that on this 26th day of May, 1981, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to:

Mr. James Fagan
Assistant United States Attorney
2211 United States District Courthouse
75 Spring Street, S.W.
Atlanta, Georgia 30303,

and to:

Mr. John F. DePue
Appellate Section
Criminal Division
United States Department of Justice
Washington, D.C. 20530,

Counsel for the Respondent and further certify that all parties required to be served have been served.



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# APPENDIX

## Appendix A

## UNITED STATES v. NIXON

**UNITED STATES OF AMERICA,**
**Plaintiff - Appellee,**

**v.**

**Franklin Eugene NIXON,**
**Defendant - Appellant.**

**No. 79-5509.**

United States Court of Appeals,
Fifth Circuit.

Jan. 16, 1981.

Defendant was convicted in the United States District Court for the Northern District of Georgia, Newell Edenfield, J., of perjury, and he appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) indictment charging defendant with perjury need not have been dismissed on basis that delay between initial arrest of defendant for counterfeiting and his trial for perjury violated his right to speedy trial as guaranteed by Sixth Amendment; (2) prosecutor's investigative delay in bringing the perjury charges did not deprive defendant of due process of law; (3) fact that any indictment returned against defendant at time of his grand jury appearance would have been subject to dismissal on speedy trial grounds did not prevent grand jury from investigating unsolved crime for which statute of limitations had not run, and did not prevent defendant's grand jury answers from meeting materiality requirement required for perjury charge; (4) prosecutor's failure to disclose agreement with alleged accomplice did not

entitle defendant to new trial; and (5) separate counts in indictment were not multiplicious.

Affirmed.

Coleman, Chief Judge, concurred in part and dissented in part and filed opinion.

**1. Criminal Law *577.14**

Dismissing indictment does not toll speedy trial calendar when next indictment is for precisely same offense and same transaction.

**2. Criminal Law *577.15(3)**

Indictment charging defendant with perjury need not have been dismissed on basis that delay between initial arrest of defendant for counterfeiting and his trial for perjury violated his right to speedy trial as guaranteed by Sixth Amendment, even though alleged perjury was related to earlier arrest for counterfeiting, and even though proof of perjury had to rely in part on same facts as those allegedly supporting counterfeiting charge, where actual offense of perjury for which defendant was indicted and convicted had not even occurred at time of defendant's alleged counterfeiting activities and did not occur until approximately two and a half years later. U.S.C.A. Const. Amend. 6.

**3. Constitutional Law *265**

Under due process clause, dismissal for preaccusation delay is required when it is shown that such delay caused substantial prejudice to defendant's rights to fair trial and that delay was intentional device to gain tactical advantage over accused. U.S.C.A. Const. Amend. 5.

**4. Constitutional Law *265**

Absent showing that delay between initial arrest of defendant for counterfeiting and trial of defendant on charges concerning alleged perjury in denying to grand jury any complicity in alleged counterfeiting was intentional device by prosecutor to gain tactical advantage over defendant, prosecutor's investigative delay in bringing the perjury charges did not deprive defendant of due process of law. U.S.C.A. Const. Amend. 5.

**5. Perjury *11(7)**

Fact that any indictment returned against defendant at time of his grand jury appearance would have been subject to dismissal on speedy trial grounds did not prevent grand jury from investigating unsolved crime for which statute of limitations had not run, and did not prevent defendant's grand jury answers from meeting materiality requirement required for perjury charge.

**6. Perjury *11(7)**

Evidence relating to materiality of defendant's answer before grand jury was relevant to issue of willfulness, and thus permitting such evidence to be heard by jury was not error in perjury prosecution.

**7. Criminal Law *700**

Defendant was entitled to disclosure of prosecution agreement with alleged accomplice for immunity in exchange for his testimony, but prosecutor's failure to disclose such agreement did not entitle defendant to new trial where defendant, who learned of the agreement during cross-examination of the accomplice, was not prejudiced in his ability to fully impeach the accomplice.

**8. Indictment nd Information *129(1)**

Separate perjury counts based upon rephrasing of same question are improper.

**9. Indictment and Information *129(1)**

Separate counts in perjury indictment were not multiplicitous where each question upon which count was based sought information relating to different aspect of alleged counterfeiting operation, and proof of each falsehood required establishment of different facts.

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Appeal from the United States District Court for the Northern District of Georgia.

Before COLEMEN, Chief Judge, RONEY and GARZA, Circuit Judges.

RONEY, Circuit Judge:

Four years after counterfeit charges were voluntarily dismissed in response to a speedy trial motion, Franklin Nixon was convicted of perjury in denying to a grand jury any complicity with the counterfeiting. He asserts this denied him his right to a speedy trial, the perjury being but an extension of the counterfeit charge. We disagree. Finding no reversible error in his other points on appeal, we affirm.

In order to understand the speedy trial issue, the dates upon which certain events transpored are important.

On June 27, 1975, based on the testimony of an alleged accomplice, a complaint charging counterfeiting was filed against Nixon and he was arrested two days later, His home was searched pursuant to a search warrant, and a printing press, a paper cutter, a cloth wiper containing traces of green ink, and other evidence were seized. A search of his business premises revealed con-

cealed above a room partition a quantity of paper of the type used for printing genuine currency.

Additional evidence against Nixon was not forthcoming, however. Divers searched the bottom of Lake Lanier where the accomplice indicated Nixon had disposed of counterfeiting paraphernalia. They were unable to locate any evidence. No other witnesses with compelling evidence against defendant were identified. Having only the accomplice's testimony and some physical evidence corroborating the story, the Assistant United States Attorney in charge of the case did not believe he could convince a jury Nixon was guilty beyond a reasonable doubt. Nixon was a wealthy man with a good reputation in the community and no apparent motive for engaging in counterfeiting. The prosecutor, recalling an earlier attempt to convict a prominent citizen of counterfeiting on the basis of the testimony of an alleged accomplice, concluded he could not convict in the face of a parade of character witnesses he expected Nixon to present. So, when on November 20, 1975, some five months after his arrest, Nixon filed a speedy trial motion, the prosecutor voluntarily dismissed the charge under rule 48(a) of the Federal Rules of Criminal Procedure instead of responding to the motion.

The record indicates that during 1976 and the first part of 1977 the Assistant United States Attorney considered the case still open and believed the Secret Service was still actively investigating it, although he had no expectation that any particular piece of additional evidence would be located. During that time there were several contacts between the United States Attorney and defendant's attorney involving efforts by defendant to persuade the prosecution to drop the case and return the seized printing press and other evidence.

Sometime around the middle of 1977, the Secret Service came up with what is termed in the record

"another piece of evidence" and located an additional witness that had previously been overlooked. Seeking to revitalize the case, the Government asked a grand jury to look into defendant's alleged counterfeiting.

Two witnesses were called before the grand jury on August 16, 1977, another was called on October 10, and on December 6 the defendant himself was called. Defendant read a statement to the grand jury and then answered the Assistant United States Attorney's questions, denying all involvement in counterfeiting. It was the answers to these questions which formed the basis for the later perjury indictment. The prosecutor did not seek an indictment for counterfeiting from the grand jury. Shortly thereafter the Assistant United States Attorney resigned, the case was assigned to another prosecutor, and nothing further happened for a year.

Then, in December 1978, a college student walking along the shore of Lake Lanier found a plastic bag containing counterfeit bills and counterfeiting paraphernalia, previously described to the Secret Service. Defendant's and the accomplice's fingerprints were found on several pieces of this evidence.

As a result of this discovery, on April 18, 1979, a new grand jury indicted Nixon for perjury allegedly committed in his appearance of December 6, 1977, in which he denied all knowledge of or complicity in the counterfeiting alleged to have taken place in 1975. He was tried and found guilty of six counts of perjury and was given six concurrent two-year jail sentences from which he now appeals.

## SPEEDY TRIAL/DUE PROCESS

Defendant contends the indictment should have been dismissed because the delay between his initial arrest for counterfeiting and his trial for perjury violated his rights to a speedy trial as guaranteed by the Sixth Amendment,

and that the delay in bringing him to trial prejudiced his ability to defend himself and therefore is a violation of his right to due process under the Fifth Amendment.

Defendant relies heavily on *United States v. Avalos*, 541 F.2d 1100 (5th Cir. 1976), *cert. denied*, 430 U.S. 970, 97 S.Ct. 1656 L.Ed.2d 363 (1977). In that case, the Government arrested defendant on drug charges in Washington, D. C. and then dismissed the charges in what the Court of Appeals for the D. C. Circuit found was a deliberate attempt at forum shopping. *United States v. Lara*, 172 U.S.App.D.C. 60, 520 F.2d 460 (D.C.Cir. 1975). Defendant was rearrested in Miami and tried. Reviewing his speedy trial claim, we held the applicable period for a speedy trial ran continuously from his arrest in Washington until his trial in Miami, even though there was a nine-month period between the Washington dismissal and the Miami arrest when he was not under arrest or indictment.

[1] *Avalos* would control this case in defendant's favor had his second trial been for counterfeiting. A complaint and arrest is the type of public accusation that sets in motion the accused's right to a speedy trial, *Dillingham v. United States*, 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975) *(per curiam)*; *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). Dismissing an indictment does not toll the speedy trial calendar when the next indictment is for precisely the same offense and the same transaction. *United States v. Avalos*, 541, F.2d at 1109.

It is clear from *Avalos*, however, as well as other cases, that "[f]or purposes of determining when the right to speedy trial attaches the *basis* for the arrest is critical." *Gravitt v. United States*, 523 F.2d 1211, 1215 n.6 (5th Cir. 1975) (emphasis in original). In *Gravitt*, petitioner was initially arrested on a state warrant charging armed robbery and assault. A search incident to the arrest re-

vealed a large number of firearms. Some time later, a formal complaint and arrest warrant were filed by federal officials charging him with interstate transportation of firearms by a convicted felon. When the speedy trial question was presented, the Court focused on the basis of the arrest and held that the time was not to be measured from the time of the initial arrest but from the time the petitioner was accused of the crime he was then challenging. The cases of *United States v. DeTienne*, 468 F.2d 151 (7th Cir. 1972), *cert. denied*, 410 U.S. 911, 93 S.Ct. 974, 35 L.Ed.2d 274 (1973), and *United States v. Cabral*, 475 F.2d 715 (1st Cir. 1973), also make it clear that the basis of the arrest is critical.

Of course, if the second charge is but a part of or only gilds the initial charge, the initial arrest would start the critical period for trial. As the Seventh Circuit observed in *DeTienne:*

> [I]f the crimes for which a defendant is ultimately prosecuted really only gild the charge underlying his initial arrest and the different accusatorial dates between them are not reasonably explicable, the initial arrest may well mark the speedy trial provision's applicability as to prosecution for all the interrelated offenses.

468 F.2d at 155.

[2] Such is not the case here. The 1975 arrest was for counterfeiting. The conviction in 1979 was for perjury. While the perjury was related to the events of 1975, the actual offense of perjury for which defendant was indicted and convicted had not even occurred in 1975, nor would it occur for another two and a half years. The different accusatorial dates are thus very "reasonably explicable," and the perjury charge does not merely "gild the charge" underlying the original arrest. Even though proof of perjury must rely in part on the same facts as

would support a counterfeiting charge, perjury is a distinct and separate offense. Even if the indictment for counterfeiting had been dismissed with prejudice on speedy trial grounds, the Government would still be permitted to use the underlying facts in that offense as the basis for a charge that the defendant committed the different offense of perjury. See *United States v. Stricklin*, 591 F.2d 1112, 1120 (5th Cir. 1979), *cert. denied*, 444 U.S. 963, 100 S.Ct. 449, 62 L.Ed.2d 375 (1980) (When a prior indictment is dismissed, "the government is not barred from using the underlying facts in that offense as the basis for a charge that he committed a different offense").

A speedy trial claim as to each separate offense must stand or fall on its own merits, based upon when the defendant was accused, by arrest or indictment, of that specific offense. Hence, just as perjury committed when one testifies falsely in self-defense during the trial for a substantive offense is separate and distinct from the underlying offense and may be subsequently prosecuted, see *United States v. Williams*, 341 U.S. 58, 71 S.Ct. 595, 95 L.Ed. 747 (1951), the arrest for the initial offense, in this case counterfeiting, did not start the time of speedy trial for the subsequently committed perjury, even though it involved testimony relating to the initial offense.

[3] Defendant argues that even if his conviction is not invalid under the speedy trial provisions of the Sixth Amendment, we should invalidate it because he has been deprived of due process of law. The Supreme Court has held that the rights of defendants against excessive pre-accusation delay are protected by the Due Process Clause of the Fifth Amendment. *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed. 2d 468 (1971). Under the Due Process Clause, dismissal for pre-accusation delay is required when it is shown that

such delay "caused substantial prejudice to [defendant's] rights to a fait trial and that the delay was an intentional device to gain tactical advantage over the accused." *United States v. Marion*, 404 U.S. at 324, 92 S.Ct. at 465. The Court held in *Lovasco* that when prosecution follows investigative delay, a defendant is not deprived of due process, even if his defense might have been prejudiced by the lapse of time. 431 U.S. at 795-96, 97 S.Ct. at 2051-2052.

[4] Nothing in the record indicates the delay in this case was "an intentional device to gain tactical advantage over the accused." Rather, this is the type of investigative delay described in *Lovasco*, where the prosecutor "refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt." 431 U.S. at 795. 97 S.Ct. at 2051. The record negates bad faith or prosecutorial harassment. The grand jury inquiry was initiated only after newly discovered evidence and a new witness with significant testimony were brought to the prosecutor's attention. We also note that the perjury prosecution was commenced only after the discovery of the incriminating evidence on the lake shore and the verification that defendant's fingerprints were on that evidence. The *Marion* test has not been met and the Due Process Clause does not require defendant's conviction to be set aside.

## MATERIALITY

As to the substance of the alleged crime, defendant contends his grand jury answers did not meet the materiality requirement for a perjury charge. A perjury conviction must be based upon testimony "material to any proper matter of inquiry." *United States v. Abrams*, 568 F.2d 411, 420 (5th Cir.), *cert. denied*, 437 U.S. 903, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978). *See also*

*United States v. Jacobs*, 543 F.2d 18 (7th Cir. 1976), *cert. denied*, 431 U.S. 929, 97 S.Ct. 2632, 53 L.Ed.2d 244 (1977); *United States v. Phillips*, 540 F.2d 319, 327-28 (8th Cir. 1975), *cert. denied*, 429 U.S. 1000, 97 S.Ct. 530, 50 L.Ed.2d 611 (1976).

[5] Defendant contends that by the time of his grand jury appearance any indictment returned against him for counterfeiting would have been subject to dismissal on speedy trial grounds because of his arrest two and one-half years earlier. He also contends the prosecutor had no other suspect in mind when he brought evidence before the grand jury. Therefore, defendant argues, his questioning was not material to any investigation the grand jury could properly conduct and his conviction should be reversed.

This argument misapprehends the nature of grand jury investigations. Even assuming that speedy trial provisions would bar the prosecution of a particular grand jury witness, or that the prosecutor does not have other suspects in mind, this does not prevent the grand jury from investigating an unsolved crime for which the statute of limitations has not run. Even if a person cannot be prosecuted for the crime under investigation, this does not give him license to commit perjury before the grand jury. *Cf. In re Grand Jury Proceedings*, 509 F.2d 1349 (5th Cir. 1975) (even immunized grand jury witness may not perjure himself); *United States v. Wilcox*, 450 F.2d 1131 (5th Cir. 1971), *cert. denied*, 405 U.S. 917, 92 S.Ct. 944, 30 L.Ed.2d 786 (1972) (same). The investigation being conducted by the grand jury was within the legitimate scope of its activities and the questions asked of defendant were material to that investigation.

[6] Defendant also contends the district court erred be permitting evidence relating to materiality to be heard by the jury. While the issue of materiality is a

question of law for the court and "evidence bearing solely on materiality should be received outside the presence of the jury," *United States v. Damato,* 554 F.2d 1371, 1373 (5th Cir. 1977); *see also Harrell v. United States,* 220 F.2d 516 (5th Cir. 1955), testimony which is relevant to the issue of willfulness or other issues at trial as well as to materiality may properly be heard before the jury. *Harrell v. United States,* 220 F.2d at 520. The testimony defendant objects to was relevant to the issue of willfulness and its admission was not error.

FAILURE TO DISCLOSE A GRANT OF IMMUNITY

[7] Defendant makes one other argument that merits discussion. He contends he is entitled to either a judgement of acquittal or a new trial because the Government made an undisclosed agreement with the accomplice for immunity in exchange for his testimony. Defendant contends that he had requested information about such an agreement and should have received pretrial notification of it. As to this issue, the panel is unanimous, Chief Judge Coleman having substantially prepared this part of the opinion.

The background facts that underlie this assertion are briefly as follows:

On June 5, 1975, in Orlando, Florida, Robert Pratt was arrested for distributing counterfeit $5 bills. Pratt told the Secret Service he had obtained the bills from Jim Gunnin, an employee of the Harold Pittman Company in Atlanta, Georgia. Gunnin was arrested and charged with counterfeiting. Gunnin agreed to cooperate with the authorities on the condition that his cooperation would be made known to the judge should he be convicted. Gunnin named as his source defendant Frank Nixon, the national Vice-President of the Harold Pittman Company. Gunnin said that he and the defendant had

made the counterfeit bills together on a printing press in the basement of Nixon's home, and that after Nixon discovered the Secret Service was closing in on the operation, he disposed of the counterfeiting paraphernalia by dumping it into Lake Lanier, near his summer home. The charges against Gunnin were dropped in September 1977, over a year after the counterfeiting charge against Nixon was dropped. Gunnin testified at the perjury trial.

On June 13, 1980, after oral argument of this appeal, this Court ordered a limited remand for a full hearing in the district court on whether the Government had, in fact, made a deal with Mr. Gunnin in return for his testimony. This hearing was promptly held July 1, 1980. Taking into account the testimony given at this hearing and the testimony presented at the 1979 trial, the following picture emerges concerning the arrangement the Government made with Mr. Gunnin.

The prosecutors and Gunnin agree that in 1975 Gunnin received no promises in exchange for his agreement to testify against Nixon. The prosecution told Gunnin only that if he cooperated fully, the judge would have this brought to his attention when Gunnin was sentenced for his part in the counterfeiting. Even though he had confessed his guilt, Gunnin was never called before a grand jury or put under oath. In September 1977, Gunnin asked to have the charges dismissed and the Government so moved under Fed.R.Crim.P. 48(a).

In 1979, in preparing to try Nixon for perjury, the new prosecutor, James Fagan, decided Gunnin would be a more credible witness against Nixon if he pleaded guilty to the charge of counterfeiting (although it had been dismissed two years previously) and thus did not appear to profit from his testimony. Fagan talked to Gunnin and suggested that he plead guilty. Gunnin had previously dealt with Assistant United States Attorney Ludwick, not Fagan, and this was not what he expected

to hear from the prosecutor. Although the prosecutors, Gunnin, and his attorney all testify that Gunnin had received no promises of immunity up to that point in 1979, the dismissal of charges against Gunnin in 1977 had led him to believe that he would not be prosecuted.

Gunnin called his attorney, Eric Welch, and they set up a meeting with Fagan on June 7, 1979. The meeting lasted 15-30 minutes. Welch told Fagan that if Gunnin was required to plead guilty, he would instruct him to refuse to testify against Nixon because it would tend to incriminate him. Fagan then retreated from his attempt to get Gunnin to plead guilty. He said he had no intention of prosecuting Gunnin because that would violate his speedy trial rights. He said the passage of four years since the initial arrest of Gunnin would make a new indictment dismissable because of a violation of Gunnin's rights to a speedy trial under the Sixth Amendment to the Constitution. Fagan told Gunnin that because of this Gunnin could not incriminate himself by testifying against Nixon. Welch asked Fagan for some tangible proof of this intention not to prosecute, in case another prosecutor took over the case. Fagan proposed that they go before a judge for some form of declaratory judgement that the Sixth Amendment prevented prosecution of Gunnin for the 1975 counterfeiting. Welch decided these verbal assurances were adequate and no such appearance before a judge would be necessary. He instructed Gunnin to testify.

Fagan, Welch, and Gunnin all testified there was no agreement or consideration in the form of immunity to Gunnin in exchange for his cooperation. It is certainly true that there was no agreement in *express terms*, specifically saying, in so many words, that "I shall do thus and so, if you do thus and so," but our analysis of what happened at the June 7 meeting compels us, nevertheless, to conclude that the parties then came to an

agreement. It was an agreement which had not existed before the meeting and one which would have been enforceable had the Government deviated from its terms. It was one which would have been wholly unnecessary-not even the subject of discussion-if the Government and not been trying to assure itself of Gunnin's indispensably necessary testimony concerning the counterfeiting activities of Nixon. Moreover, the prosecutor initiated the discussions because he wished, by the plea, to make it appear to the jury that Gunnin was not getting anything in return for his testimony.

Gunnin came to the June 7 meeting with Fagan in an agitated state, taking the position that he would refuse to testify if Fagan insisted that he plead guilty. Gunnin had previously cooperated completely with the Government, so this was a change in his position. In response to this, Fagan gave Gunnin absolute guarantees that he would not be prosecuted, an assurance which Gunnin had not previously received. Both the prosecutor and Gunnin yielded something highly desired by the other. What it all came to was a clear understanding: the Government guaranteed that Gunnin would not be prosecuted and Gunnin agreed to testify.

The defense was entitled to know about this agreement for impeachment purposes, and the Government was compelled to disclose it under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). There is no doubt that had this agreement remained secret during the trial, Nixon would be entitled to a new trial. *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

Yet even though defendant had no advance notice of what went on at the June 7 meeting, the facts nevertheless came out on cross-examination at the trial on the merits. In that cross-examination Gunnin admitted from

the witness stand that he had never been indicted for counterfeiting and he had never been subpoenaed before a grand jury. He admitted the recent meeting with the prosecutor, in which he had been told he could either testify because it was too late for the Government to pursue the counterfeiting charge, or they could give him immunity and command him to testify, and that either way he would not be prosecuted for counterfeiting. To quote him exactly, near the close of his testimony, "If I didn't want to testify, they would grant me immunity and make me testify. But, they couldn't prosecute us on the counterfeiting charge anyway, so I really didn't have a choice . . ."

On oral argument in Atlanta, we deemed it our duty to order a limited remand to ascertain if all of the facts surrounding this very sensitive June 7 meeting had come out on cross-examination. The able district judge promptly held a full-scale hearing, at which Gunnin, the prosecutor, and Gunnin's attorney at the time of the meeting all testified. We have read the testimony and it adds nothing material to what was learned and laid before the jury when Gunnin was corss-examined at the trial.

The inevitable result is that while the Government should have made a full disclosure of this meeting in advance of the trial, the defense alertly brought it out. The jury had the benefit of it insofar as it might have affected Gunnin's credibility. Nixon's counsel contends that had he received advance notice of this June 7 agreement and thus had been made familiar with its details before trial, he would have been better able to cross-examine Gunnin. The limited remand hearing, however, revealed nothing beyond what resourceful counsel had already elicited in the presence of the jury, and there is no indication in that hearing that prior knowledge of the June 7 agreement would have aided the cross-examination. The failure of the prosecution to make full disclosure of this

meeting and what happened there is not to be commended. Nevertheless, the late disclosure in no way prejudiced full impeachment of Gunnin in connection therewith and we may not reverse for this failure. *See, e. g., United States v. Campagnuolo,* 592 F.2d 852, 860 (5th Cir. 1979); *United States v. Arcentales,* 532 F.2d 1046 (5th Cir. 1976); *United States v. Scott,* 524 F.2d 465, 468 (5th Cir. 1975).

## OTHER CONTENTIONS

[8,9] Defendant argues that the counts of the indictment are multiplicious. We disagree. While separate perjury counts based upon a rephrasing of the same question are improper, "if a witness before a grand jury tells two separate and distinct lies, he may be prosecuted on a separate count for each lie." *United States v. Tyrone,* 451 F.2d 16, 18 (9th Cir. 1971), *cert. denied,* 405 U.S. 1075, 92 S.Ct. 1494, 31 L.Ed.2d 808 (1972). Here, as shown by examination of the various counts, each question sought information relating to a different aspect of the counterfeiting operation and the proof of each falsehood required the establishment of different facts. Under these circumstances, the indictment was not multiplicious.

Defendant makes several allegations of erroneous evidentiary rulings by the trial court. We have considered each one and have not found any abuse of discretion or any reversible error by the trial court.

Defendant contends that in instructing the jury the court improperly suggested defendant was guilty of other acts of counterfeiting. Viewing the instructions in their entirety and in the context of the evidence at trial, *see Park v. United States,* 421 U.S. 658, 674-75, 95 S.Ct. 1903, 1912-1913, 44 L.Ed.2d 489 (1975), we find no reversible error.

AFFIRMED.

COLEMAN, Chief Judge, concurring in part and dissenting in part.

Except as hereinafter indicated I concur in the foregoing opinion of the Court. I would totally concur if the government had not deliberately stripped Nixon of his speedy trial rights on the counterfeiting charges by dismissing the complaint against him while thereafter persisting in its efforts to find a way to convict him. Additionally, because Nixon was the sole suspect when called before the grand jury and could not at that time have been prosecuted for counterfeiting I believe that his interrogation was immaterial.

If I were to look at the situation as it is compartmentally viewed in its respective parts by the opinion so excellently written by Judge Roney I would agree all the way and it may be that my reasoning is simply wrong. Nevertheless, I feel that in evaluating the constitutional rights of the citizen against the government in a criminal case the picture must be viewed as a whole, else constitutional rights could be nibbled away, one fragment at a time.

With these preliminary observations, I state my views of this case.

On June 29, 1975, the government saw fit to charge Nixon with counterfeiting.

On December 8, confronted with a speedy trial motion, the government evaded the speedy trial guarantee by dismissing the complaint.

It is undisputed that this action was taken because it was the considered judgement of the prosecution that on the evidence it then had a conviction could not be expected.

Even so, the government continued to investigate, hoping to come up with something that would get a conviction. Therefore, it can hardly be doubted that the

dismissal was strategical and it must be assumed that had Nixon been given his rights he would have been acquitted.

TWO YEARS after the complaint had been dismissed in response to a speedy trial motion the government had no evidence beyond what it had available at the date of the dismissal. Nevertheless, the prosecutor hit upon the idea that if Nixon were called before a grand jury he would admit his guilt. Nixon appeared and denied guilt.

A year later, the incriminating evidence was discovered. Nixon was indicted, not for the counterfeiting which this evidence supported but for falsely denying his guilt to the 1978 grand jury.

If I were deciding this case individually I would hold that when the grand jury, at the instance of the prosecutor and for the effectuation of his strategy, called Nixon for interrogation about the counterfeiting, as the sole suspect, it was conducting an immaterial investigation because Nixon could not have been tried for the counterfeiting even if he had been indicted.

I agree, of course, that perjury is never to be justified or condoned, whatever the circumstances. I believe, also, that prosecutions for perjury are subject to constitutional restrictions exactly like any other prosecution.

To prove the perjury the government, having defeated Nixon of his speedy trial for that offense, had to prove that offense as the indispensable basis for its perjury conviction. To that extent at least, Nixon's right to a speedy trial has been sucessfully circumvented. The government strategy worked.

Everyone would agree, of course, that for perjury to be an offense it must have been committed with reference to a material matter.

Having stated my appraisal of this case I shall not belabor the matter with a protracted discussion of *Barker*

*v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

I believe that if the government judges its evidence to be insufficient and for that reason evades a speedy trial motion by dismissing the complaint, in the hope that it can compile a better case later, and is thereafter allowed to revive the charges in the manner used in this case the constitutional right to a speedy trial has been violated. I think we are taught that by *Klopfer v. North Carolina,* 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). There, a unanimous Supreme Court held that if a prosecutor, by nolle prosequi, over objection, defers trial for an unlimited time, governed by his own discretion, the right to a speedy trial is violated.

And, in any event, when interrogating Nixon the grand jury was pursuing an immaterial matter, *United States v. Icardi,* 140 F.Supp. 383 (1956).

To the extent stated, and with great deference, I respectfully dissent.

# APPENDIX

Appendix B

# IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO. 79-5509

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANKLIN EUGENE NIXON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion January 16, 1981, 5 Cir., 19__,____F.2a__).

(APRIL 29, 1981)

Before COLEMAN, RONEY and GARZA, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

Appendix C

# UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO. 79-5509

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D. C. Docket No. CR79-98A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANKLIN EUGENE NIXON,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

Before COLEMAN, Chief Judge, RONEY and GARZA, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conviction of the said District Court in this cause be, and the same is hereby, affirmed.

January 16, 1981

COLEMAN, Chief Judge, concurring in part and dissenting in part.